1966

Marinda Day v. Lorenzo Smith & Son, Inc. : Respondent's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MARINDA DAY,
Plaintiff-Appellant

vs.

LORENZO SMITH & SON, INC., a Utah Corporation,
Defendant-Respondent

Case No. 10256

RESPONDENT'S BRIEF

Appeal From the Judgment of the
Third District Court for Salt Lake County
Hon. A. H. Ellett, Judge

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PRELIMINARY STATEMENT

Lorenzo Smith & Son, hereinafter referred to as "defendant" does not adopt the Statement of Facts set forth in the brief of Marinda Day, hereinafter referred to as the "plaintiff". The Jury answered five questions in a special verdict resulting in a judgment in favor of the defendant, no cause of action.

In view of the jury verdict and judgment, wherever the evidence is in conflict, it must be viewed in the light most favorable to the defendant. *Rivas v. Pacific Finance Co.*, ___ Utah 2d ___, 397 P. 2d 990 (1964), *Hales v. Peterson*, 11 Utah 2d 411, 360 P. 2d 822 (1961).

STATEMENT OF FACTS

On the morning of September 11, 1961, plaintiff was riding as a passenger in a 1949 Chevrolet Sedan modified into a pickup truck enroute from Fillmore to Provo, Utah, on U.S. Highway 91. (R 215) The truck was driven by plaintiff's friend, Larry Roberts, who was 16 years of age. (R 214) It was a clear fall morning and the roads were dry. (R 138) Roberts was driving at approximately 50 to 60 miles per hour. (R 216, 382) Juab County Sheriff Ray Jackson was also proceeding North on U.S. Highway 91 in a patrol car about one half mile in back of the Roberts truck. (R 139) At approximately 10:30 A.M. Roberts approached an area where other vehicles were parked along the highway about 4.3 miles north of Nephi, Utah. There was a Ford station wagon parked on the East shoulder of the highway facing North. (Exh P-1) A Utah highway patrol car was parked off the highway on the east side facing north. (R 140) The two rear stop lights on the patrol car were flashing on and off. (R 180) A foreign car was parked on the west shoulder of the highway facing north. (Exh D-4) There were other vehicles on the West side of the highway facing South. (R 175, Exh P-1 and P-3) Utah Highway patrolman Eldon Sherwood was on the West shoulder of the highway. (R 177) Sherwood was standing at the rear of the foreign car talking to a Mrs. Naismith. (R 176, 211) He was completing an investigation of a one car accident involving a roll over of the foreign car. (R 174) Mr. Henry Kelly, his son Robert, the occupants of the Ford Station wagon; Mr. Desmond Naismith, Helen Naismith, the occupants of the foreign car, and others were at the scene of the roll over of the foreign car. (R 176) When Roberts approached the

scene of the accident involving the foreign car, his speed was not noticably diminished. (R 338) Roberts speed was estimated at 45 to 60 miles per hour as he drove into the area where the other cars were stopped. (R 339, 382) As they came into the area, Roberts made a "slight turn" to the left to go out around the patrolman's car. (R 256)

While Roberts was approaching the accident scene, Joseph Ivy Mitchell, an employee of the defendant, was driving defendant's 1961 Corvair box truck (Greenbriar) South on U.S. Highway 91. (R 143) Mitchell drove through the accident area "very slowly". (R 213) Helen Naismith estimated his speed at 5 miles per hour. (R 213) As Mitchell proceeded South and Roberts proceeded North through the scene of the first accident, the vehicles sideswiped each other. (R 338) The impact between the two vehicles occurred South of the foreign (Naismith) car. (R 204, 346) The noise of the impact was to the right rear of Sherwood who turned immediately and saw the Roberts truck "take off" obliquely down the east side of the highway, travel some distance, turn sideways, skid and roll over one complete turn. (R 177, 178) The Roberts vehicle came to rest 310 feet down the highway from the point where the two vehicles came together. (R 178) Mitchell drove defendant's vehicle off on the west side of the highway about 150 feet from the point of impact. (R 178) Sherwood got in his patrol car and drove down the highway to the Roberts truck. (R 184) Plaintiff had been thrown out of the truck at the time it had rolled over. (R 327) Sherwood investigated the accident between the Roberts truck and defendant's Corvair Greenbriar. (R 174) In his investigation Sherwood examined the debris on the highway, (R 182)

the skid marks left by the Roberts truck, (R 179) the damage to the two vehicles (R 184, 185) and he talked to the drivers of the two vehicles. (R 181, 188) Sherwood determined from his investigation that the impact between the two vehicles occurred on the West (defendant's) side of the highway. (R 184) Sherwood's examination of the Roberts truck disclosed the brake pedal could be pushed to the floor without any brake action. (R 184)

There was a conflict in the testimony as to whether the point of impact was on the west or east side of the highway. The plaintiff and her driver, Larry Roberts, testified the impact was on the east (plaintiff's) side. (R 233, 218) Henry Kelly and his son Robert Kelly testified the impact occurred on the west (defendant's) side. (R 339, 384) Desmond Naismith and Marion Brown testified the impact occurred on the east (plaintiff's) side. (R 194, 322) Sherwood, the investigating officer, determined the impact was on the west (defendant's) side of the highway. (R 184) Sheriff Jackson, who came on the scene of the accident shortly after it occurred, testified he couldn't tell where the point of impact was. (R 145)

The case was submitted to the jury in a special verdict. On the basis of the answers given by the jury, the court entered a judgment of no cause of action. (R 420)

The only point raised on appeal is that the trial court erred in permitting the highway patrolman to give his opinion as to the point of impact.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY PERMITTED THE HIGHWAY PATROLMAN TO TESTIFY AS TO THE POINT OF IMPACT.

A. THE TRIAL COURT PROPERLY PERMITTED THE PATROLMAN TO BE CROSS EXAMINED ON THE POINT OF IMPACT AFTER PLAINTIFF OPENED THE INQUIRY ON DIRECT EXAMINATION.

Plaintiff called highway patrolman Eldon C. Sherwood as her own witness. (R 174) *Sherwood testified he had 24 years experience in investigating accidents.* (R 174) Defendant stipulated that patrolman Sherwood was an expert in the matter of accident investigation. (R 174) *Plaintiff's attorney opened the subject of point of collision in his direct examination of officer Sherwood.*

> Q. (Mr. Beesley) I see. *Now, were there any objective signs whatsoever to determine the point of collision?* (Italics ours)
>
> A. No.
>
> MR. NEBEKER: I will object to that, Your Honor. I think he can state what he saw and let the jury decide.
>
> THE COURT: Well, since he says no, I guess we don't have to pursue it further.

Mr. Beesley: I don't intend to, Your Honor. (R 181)

The inference raised by this question and answer was that the patrolman could not determine the point of impact. On *Cross examination* defendant's counsel asked Sherwood if he had examined the road where the two vehicles collided, if he found debris on the road and if he determined the point of impact to which he answered "yes". Plaintiff's counsel objected to any "opinion" from the patrolman.

Q. (Mr. Nebeker) I see. Now, you did examine the roadway where these two vehicles had collided, did you not?

A. Yes.

Q. And you found that there was considerable debris on the road there, did you not?

A. Well, I wouldn't know about the considerable amount, but there was debris.

Q. From your examination of the road, you made a determination as to the approximate point of impact, did you not?

A. Yes.

Q. Was that point of impact on the east or the west side of the road?

A. It was near the center line, and my best opinion, it may have been—

MR. BEESLEY: I will object to any opinion, Your Honor.

THE COURT. Well, you may give your judgment. If you are giving us an opinion, he would be right. If you mean by your opinion your best judgment as to what you judge it would be, I think you might proceed, Sergeant, and I don't quite know—

Q. Give us your judgment.

MR. BEESLEY: Make the same objection, Your Honor.

THE COURT: Let's find out if he has a judgment or giving an opinion. If he is giving an opinion, he can't.

Q. Do you have a judgment as to where the point of impact occurred?

A. Yes.

Q. Will you tell us what that judgment is?

MR. BEESLEY: Objection, Your Honor.

THE COURT: It's overruled. He may give his judgment.

A. As near the center line and probably a little bit west.

MR. BEESLEY: I object to any probability, Your Honor.

THE COURT: If you are confining it to your judgment—

Q. Just give us your best judgment.

THE COURT: You can tell us your judgment.

MR. BEESLEY: I believe he said the center line.

A. Near the center line.

Q. Was it on the west or the east of the center line?

A. Do I have to answer that "Yes" or "No"?

Q. Yes.

A. My opinion is no good?

Q. Just give us your judgment.

THE COURT: You can give your judgment, Sergeant.

A. My judgment, slightly to the west of the center line.

Q. Would you say it was about a foot to the west of the center line?

A. I think that would be a fair figure.

Q. It could have been a little further west?

It could have been a little further east?

A. Yes. (R 182, 183, 184)

The trial court, in directing defendant's counsel to find out if the patrolman had a "judgment" as to the point of impact rather than an "opinion", was apparently attempting to determine if the patrolman's testimony was based on his

personal observation and investigation of the accident scene or whether his testimony arose from a belief or impression obtained from some other source.

The plaintiff's attorney did not object to the patrolman's opinion on the ground it was not proper cross examination. He obviously could not object on that ground because he had opened the inquiry in his direct examination by asking the patrolman if there were any "objective signs" whatsoever to determine the point of impact which was answered "no".

> Q. I see. Now, were there any objective signs whatsoever to determine the point of collision?
>
> A. No. (R 181)

In view of the negative inference created by the attorney for the plaintiff on direct examination, defendant's attorney was entitled to cross examine the patrolman as to whether or not there were "objective signs" on the highway to determine the point of collision, and if so, where it was. Plaintiff should not be permitted to raise a negative inference on direct examination and then object to cross examination on the same subject.

It is axiomatic that a witness may be cross examined as to his direct testimony and as to whatever goes to explain, modify or discredit what he has stated on direct examination. 58 Am. Jur. Witnesses Sec. 610

> "Character and Purpose. The cross-examination of witnesses is one of the safeguards to accuracy and truthfulness. The test of cross-examination is the highest and the most indispensable known to the

> law for the discovery of truth. When a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, and his powers of discernment, memory and description. *The purpose of the cross-examination is to test the truthfulness of the witness, to sift, modify, or explain what has been said, to develop new or old facts in a view favorable to the cross-examiner, or to discredit the witness, and, if he is the plaintiff, to test his good faith—the righteousness of his case.*" (Italics ours)

The adversary system of justice is predicated on the fundamental right of cross examination. In *State v. Zolan-Takis*, 70 Utah 296, 259 Pac. 1044 (1927) this Court stated that in a judicial investigation the right of cross examination is an absolute right and not a mere privilege of the party against whom the witness is called. It is only after such right has been substantiated and fairly exercised that the allowance of further cross examination will be discretionary. This Court has previously held that cross examination should never be curtailed or limited so long as it tends to disclose the truth. *State v. Peck*, 1 Utah 2d 263, 265 P. 2d 630 (1953).

If there ever was any valid objection to Sherwood's testimony regarding point of impact, plaintiff's attorney *waived* his objection by opening the matter on direct examination.

In *Wollan v. Billett*, 375 P. 2d 146 (Wash. 1962) the Supreme Court of Washington held that defendant's attorney had waived his objection to an opinion given by a witness as to point of impact, when he had opened the inquiry as to the point of impact on cross examination. The Court stated:

> "A member of the traffic division of the Tacoma police department was called as a witness for the respondents. On cross examination, appellant's counsel inquired if the witness could fix the point of impact, to which he replied "Not exactly, no, sir." Thereafter, on redirect examination, he did express his opinion on the point in question, to which the appellant's counsel objected on the ground that the witness was not qualified as an expert. *Assuming the objection valid, it was waived by the appellant in opening the inquiry.*" (Italics ours)

In *Hooper v. Bronson*, 266 P. 2d 590 (Cal 1954) the trial court permitted a police officer to express his opinion as to the point of impact between a truck and sedan. The opinion was elicited on cross examination over the objection of plaintiff's counsel. The Appellate Court held that the trial court did not commit prejudicial error in allowing the police officer to express his opinion as to the point of impact. The court said that when the exact point of impact is in dispute, a police officer experienced in investigating accidents might express his opinion thereon, basing such opinion on the physical facts, such as location of skid marks, broken glass and other debris. *The court called attention to the fact that the officer had previously testified, in effect, as to the point of impact.*

It is respectfully submitted that plaintiff should not be permitted to complain of testimony elicited on cross examination when she opened the subject matter on direct. To prohibit cross examination on a subject opened on direct is to nullify defendant's right to a fair trial.

B. POINT OF IMPACT IS A PROPER SUBJECT FOR EXPERT OPINION TESTIMONY

In considering the admissibility of expert opinion testimony, the Utah Supreme Court stated in *Webb v. Olin Mathieson Chemical Corporation,* 9 Utah 2d 275, 342 P. 2d 1094 (1959):

> "Inherent in the position of the trial judge in the immediate control of the trial is the responsibility of passing upon whether the subject justifies expert testimony and the qualifications of the witness as to whether he can give sound and reliable help to the jury on it."

The general rule with regard to the admissibility of opinion testimony on point of impact is succinctly stated in 20 Am. Jur. Evidence Section 806:

> "* * * Opinions are admissible also as to the location of a point where a specific occurrence took place * * *" (citing in Supplement Annotation at 66 ALR 2d 1048)

The question of admissibility of opinion evidence on point of impact has been considered by a number of courts in recent years. An annotation in 66 ALR 2d 1048 entitled *"Admissibility of opinion evidence as to point of impact or*

collision in motor vehicle accident case" presents an exhaustive review of the cases dealing with the problem.

The annotator in his summary concludes that while some cases hold that expert evidence as to point of impact is not admissible, *there is a strong and apparently growing authority holding or recognizing that skilled or expert opinion evidence is admissible on the point of collision.*

> "These courts (holding that expert opinion evidence is admissible on point of import) recognize that opinions given by skilled or expert witnesses aid the jury, or the court sitting in lieu thereof, in drawing correct inferences from the raw and unsorted facts, and that such evidence does not usurp the province of the jury, since the jury does not have to accept the witness' opinions. *In addition, it may be noted that the cases holding or recognizing the admissibility of skilled or expert opinion evidence show that the witness giving the testimony had an opportunity to investigate the scene reasonably soon after the accident and had sufficient experience to form a reasonable opinion based upon his observations.* (Italics ours)

With regard to the question of admissibility of expert opinion testimony on the subject of point of impact it may be noted generally that a number of later decisions manifest a more favorable attitude toward the admission of expert testimony upon this question. See 66 ALR 2d 1054. The Courts reach this conclusion upon the ground that a skilled or expert witness can aid the Jury in drawing correct inferences from raw and unsorted facts.

In the following cases the Courts held that point of impact was a proper subject for expert opinion testimony.

UTAH

The annotation in 66 ALR 2d 1048, 1067 lists Utah among the States admitting opinion evidence on point of impact citing *State v. Bleazard,* 103 Utah 113, 133 P. 2d 1000 (1943). Defendant Bleazard was convicted of the crime of involuntary manslaughter as the result of an automobile collision. A highway patrolman who reached the scene shortly after the accident, was permitted to *identify a map prepared by him which gave certain measurements and attempted to locate the point of impact.*

On cross examination the patrolman was asked the following question by counsel for defendant:

> "In your opinion, is it not possible and probable that it was the crash of the Boyington car that caused the death of Mrs. Gardiner and not the impact with the Bleazard car?"

Counsel for the State objected that the question was not the subject of opinion evidence. The court sustained the objection and the defendant assigned it as error.

The Supreme Court affirmed the ruling of the trial court stating:

> "It is not the province of a witness to act as judge or jury and questions calling for his opinion should be so framed as to not call upon him to determine controverted questions of fact or to pass upon the preponderance of testimony."

The objection was sustained on the ground that the question was on *causation* and invaded the province of the jury. There was no contention made that *point of impact* was not a proper subject for expert opinion testimony or that it invaded the province of the jury.

The question of *causation,* i.e. "what caused the death of Mrs. Gardiner", is an entirely different matter from that of *point of impact* i.e. "where was the place on the highway where the collision occurred?"

The opinion clearly states that the highway patrolman was permitted to identify a map which attempted to locate the point of impact.

With regard to the question of causation, the courts attention is directed to *Hooper v. General Motors,* 123 Utah 515, 260 P. 2d 549 (1953) where this court held an expert may give an opinion as to the cause of a particular occurrence or condition. This Court stated:

> "The modern tendency and the rule of this court is that an expert may give an opinion as to the cause of a particular occurrence or condition regardless of whether the cause of such occurrence or condition is in dispute and regardless of whether the jury must determine which of the causes urged by the respective parties is the correct one."

CALIFORNIA

In *People v. Haeussler,* 260 P. 2d 8 (Cal. 1953) the Supreme Court of California held that a highway patrolman with many years experience in investigating accidents

and who was upon the scene a few minutes after the accident could give his opinion as to the point of impact. His opinion was based upon an inspection of skid and gouge marks on the pavement and the location of oil, broken glass, parts of the vehicles and other debris.

See also *Hooper v. Bronson Supra* (Holding expert opinion is admissible as to point of impact)

IDAHO

In *Grant v. Clark*, 305 P. 2d 752 (Idaho 1956) The Supreme Court held the trial court properly admitted the testimony of a Sheriff wherein he gave his opinion as to the probable point of impact. The Court stated:

> "The appellant contends that it was inadmissible as the sheriff was not qualified as an expert. The sheriff testified that he had examined a great many accidents during his work, which extended over two terms, or four years, as sheriff; that in his investigations he had tried to determine what had happened at the accidents, and particularly to locate the points of impact of the automobiles in the various accidents. The record discloses that this witness arrived shortly after the collision. He testified to the location of the two automobiles when he arrived, and said that he observed the debris on the right-hand side of the road, on the south edge of the oil, when going toward Hammett. He testified that from his investigation that in his opinion the point of impact was on the south side of the road (Clarke's side) near the edge of the oil."

The Appellate Court affirmed the trial court's ruling admitting the testimony of the Sheriff.

ARIZONA

In *Gray v. Woods,* 324 P. 2d 220 (Arizona 1958) The Supreme Court held that a highway patrolman was properly allowed to give his opinion on the point of impact. The patrolman testified that as a result of his investigation he found dirt and debris on the highway and gouge marks in the pavement left by one of the wheels of the Studebaker. Based upon his previous experience and training and the evidence at the scene of the collision, he was permitted to give his opinion as to the point of impact.

The Court stated:

> "It is now generally recognized that a highway patrolman or other officer, when shown to have proper training and experience in the investigation of traffic accidents, testifying as an expert witness, may properly give an opinion as to the point of impact in a traffic accident where his opinion is based on marks on the highway, damage to the vehicles involved and the location of debris on the highway or other indicia at the scene, but not when such opinion is founded on statements made to him by other persons. Grant v. Clarke, 78 Idaho 412, 305 P. 2d 752; Wells Truckways, Ltd. v. Cebrian, 122 Cal. App. 2d 666, 265 P. 2d 557; Kalfus v. Fraze, 136 Cal. App. 2d 415, 288 P. 2d 967; People v. Haeussler, 41 Cal. 2d 252, 260 P. 2d 8; Nielsen v. Wessels, 247 Iowa 213, 73 N.W. 2d 83; Tuck v. Buller, Okl., 311 P. 2d 212."

COLORADO

In *McNelley v. Smith,* 368 P. 2d 555 (Colo. 1962) the Supreme Court held that it was competent for a police of-

ficer to testify as to the point of impact and the angle of a collision. These were matters which he determined solely from the physical facts existing at the scene of the accident.

C. ADMISSIBILITY OF EXPERT OPINION ON POINT OF IMPACT RESTS WITHIN DISCRETION OF TRIAL COURT AND ITS RULING WILL NOT BE REVERSED UNLESS DISCRETION HAS BEEN ABUSED

A number of courts have held that the question of admissibility of expert opinion as to the point of impact in a motor vehicle accident case must be left to the common sense and discretion of the trial court.

In the following cases the appellate court held the trial court did not abuse its discretion in admitting expert opinion testimony.

UTAH

The Utah Supreme Court in *Webb v. Olin Mathieson Chemical Corporation Supra,* confronted with the question of admissibility of expert opinion testimony, stated that the trial court must be allowed a considerable latitude of discretion in making such determination.

> "The practical exigencies of the situation make it necessary that the trial court be allowed considerable latitude of discretion in making such determination. His rulings in that regard should not be disturbed lightly, nor at all unless it clearly appears that he was in error in his judgment on the matter."

Also in *Joseph v. W. H. Groves Latter Day Saints Hospital,* 7 Utah 2d 39, 318 P. 2d 330 (1957) this court in discussing the admissibility of expert opinion testimony where the objection was that it went to the "very issue before the jury", held the testimony admissible saying:

> "If the opinion evidence is such that it will aid the jury in understanding their problems and lead them to the truth as to disputed issues of fact, it is competent and admissible, irrespective of whether it bears directly upon the ultimate fact the jury is to determine. *And the trial judge is allowed a wide discretion in regard to the allowance of such testimony.* (Italics ours)

CALIFORNIA

In *Zelayeta v. Pacific Greyhound Lines,* 232 P. 2d 572 (Cal. 1951) the appellate court held the trial court did not err in permitting a traffic officer to give his opinion as to the point of impact in a collision between a bus and an automobile. *The court stated it was within the discretion of the trial court to admit this opinion evidence.*

WASHINGTON

In *Gerberg v. Crosby* 329 P. 2d 184 (Wash. 1958) the Supreme Court of Washington, in a well reasoned opinion, held that there was no abuse of the trial court's discretion in admitting a police officer's opinion as to point of impact based on the physical facts observed after the accident.

The officer was qualified as an expert in accident investigation. The Court relates the sequence of his testimony as follows:

> "When asked whether he had located the point of impact in the accident between the Crosby car and the Gerberg motorcycle, he replied that he had. Appellants objected to Hendren's testimony as to the location of the point of impact on the ground that this was not a proper subject of expert testimony. No objection was made to the qualifications of Hendren as an expert. The trial court overruled the objection and admitted the evidence. Hendren made it clear that he based his opinion solely on skid marks made by the motorcycle after the collision."

The court then discussed the reasons why opinion testimony should be admitted quoting from Professor Edmund M. Morgan in his foreword to the Model Code of Evidence:

> "Judges and lawyers agree with commentators that the entire body of law dealing with opinion evidence needs radical revision. Mr. Wigmore says that the opinion rule 'has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling.' The rules evolved in this country which prevent a witness from relating his relevant experiences in language naturally and ordinarily used by laymen, because phrased in terms of inferences or conclusions, have invited numberless trivial appeals and have caused many indefensible reversals. They are vague in phrasing and capable of capricious application. There is an encouraging tendency in some modern trial courts to disregard them and in the more progressive appellate courts to refuse to interfere with the trial judge's application of them."

The Court quoted from *Grismore v. Consolidated Products Co.*, 5 N.W. 2d 646, 655 (Iowa 1942) where the

court discussed the place of expert testimony in modern trials, saying:

> " * * * It would be difficult to find a subject in law in which there has been more judicial confusion and quibbling, both in our own court and in those of other jurisdictions. It would also be difficult to find a single subject that has been provocative of more useless appeals than the matter of expert opinion testimony. In the early days of court procedure there was less need of expert opinion testimony. But with the complexity of modern life and with the amazing growth and advancement of a myriad of matters of science, art, mechanics, discovery, invention and industry, which touch our daily life constantly on every side, a failure to make the fullest use of expert opinions in court procedure means, in a great many cases a denial of proof and necessarily a denial of justice. For too many years too many courts have so frowned upon expert opinion testimony and have so restricted its admission and consideration that the triers of facts have been denied aid that was essential to a proper determination of litigated causes."

The court concluded by stating that in the field of expert testimony much must be left to the common sense and discretion of the trial court. The court found no abuse of discretion in the admission of the officer's testimony.

OKLAHOMA

In *Tuck v. Buller*, 311 P. 2d 212, 66 ALR 2d 1043 (Okla. 1957) the Supreme Court of Oklahoma held the trial court did not abuse its discretion in permitting a highway

patrolman to state his opinion as to the point of impact. *The court stated that a wide latitude of discretion is given the trial court in the determination of the admission of expert testimony.* The court relied upon the California case of *Kalfus v. Fraze,* 288 P. 2d 967 (Cal. 1955) wherein it was held that a police officer with proper training and experience in investigation of traffic accidents could give expert testimony as to the point of impact when his opinion derived from examination of physical evidence or indicia at the scene.

The court held:

> "The contention of defendant relative to the alleged error in admitting expert testimony as to point of impact being substantially the same as in the *Kalfus* case, *supra,* and being without controlling precedent in our own state, we adhere to the rule and reasoning enunciated therein, and apply the same to this case, and hold that the highway patrolman, who was qualified by training and experience in the investigation of traffic accidents and submission of reports on facts and causes of such accidents, may give expert testimony as to the point of impact when, as in this case, his opinion derives from examination of physical evidence or indicia at the scene of the accident."

The trial judge must consider all the circumstances under which the expert opinion is offered, including the qualifications of the expert, the subject of his opinion, the foundation for his opinion and whether or not it invades the province of the jury. When the trial judge has admitted such testimony, his decision should not be over-

turned unless there is a clear showing that he has abused his discretion.

It is earnestly submitted that the trial judge in this case did not abuse his discretion but properly permitted the highway patrolman to testify on the point of impact.

D. THE OPINION OF PATROLMAN SHERWOOD WAS BASED UPON AN INVESTIGATION OF THE ACCIDENT SCENE.

Plaintiff contends in her brief (page 23) that the opinion of Patrolman Sherwood was based upon some source other than the competent facts. Plaintiff called Sherwood as her own witness. (R. 174) Plaintiff admits in her brief that *she vouched for the patrolman's credibility when she put him on the witness stand.* (Plaintiff's brief page 9). Plaintiff admitted the patrolman was qualified to testify as to the point of impact by asking him on direct examination if there were *"objective signs"* to determine the point of collision. (R 181) There were no questions about the patrolman's qualifications as an expert. *He had been investigating accidents for 24 years.* (R 174) The record unequivocally shows that the patrolman's testimony on the point of impact was based on his *personal observations* at the accident scene.

He was on the highway investigating a prior accident when the impact between the Robert's truck and defendant's vehicle occurred. (R 174) The noise of the impact caused Sherwood to turn around in less than a second. (R 180)

Q. (Mr. Beesley) What was the first thing that occurred that drew your attention that an accident had happened?

A. The noise of the impact being so close to me.

Q. All right. Would you describe the sequence of events after you heard the noise?

A. The noise was more to my rear and to my right, so I just turned to the right and saw this Davies vehicle taking off down the pavement on the right or east side of the highway and it travelled some distance, and then it turned sideways and skidded and then rolled one complete turn. (R 177, 178)

The patrolman was an eye witness to the course travelled by the Roberts truck immediately after impact and its roll over 310 feet down the highway. (R 177) Sherwood testified to the skid marks laid down by the Robert's truck after the impact and drew them on the blackboard. (R 179) He measured the distance from the *point* where the two vehicles came together to where they finally came to rest, the Roberts truck going on north 310 feet and the defendant's vehicle going south 150 feet. (R 178)

Sherwood testified that he examined both the Robert's truck and the defendant's vehicle and he described the damage to both vehicles. (R 185) He further testified that he examined the highway where the two vehicles collided, that there was debris on the highway and that he made a determination as to the approximate point of

impact. (R 182) *Sherwood testified to these facts from his own personal observations.*

There is not one *scintilla* of evidence in this case to support plaintiff's contention that patrolman Sherwood based his opinion on statements made by others.

The Court and the jury were made aware of the facts upon which Sherwood based his opinion. The question of the weight to be given his opinion was clearly a matter for the jury. 20 Am. Jur. 671, Evidence, Section 798:

> "The admissibility of expert testimony is a question for the court, while its weight is a matter properly evaluated by the jury."

E. ALLOWING THE PATROLMAN TO TESTIFY ON THE POINT OF IMPACT DID NOT CONSTITUTE PREJUDICIAL ERROR.

Plaintiff claims in her brief (page 30) that the court refused to permit Sheriff Jackson to give his "opinion" (R 156) but permitted patrolman Sherwood to give his "judgment" (R 184) as to the point of impact.

The record conclusively shows that plaintiff Jackson could not determine the point of collision between the Roberts truck and defendant's vehicle.

> Q. (Mr. Beesley) Were you able to determine the point of collision that these cars had?
>
> A. No.
>
> Q. Why not?

A. There was no marks on the highway other than the debris which covered a large area. Now, this debris was glass and dirt, and there was no point that I—we could determine or I could determine where the point of impact were and where one car was in relationship to the other car. The first marks laid down by any vehicle was the Roberts car after it left the scene, and if you don't mind, I will show you where they started. (R 145)

On redirect examination plaintiff's attorney was asking Sheriff Jackson about the "marks" on the highway running from the Roberts vehicle when the Sheriff *volunteered* his "opinion." He obviously was not going to volunteer an opinion on the point of impact when he had previously testified he could not determine where it was.

An examination of the record discloses that the Sheriff was not asked for his opinion as to point of impact nor was he volunteering an opinion as to point of impact, *but that it was his opinion from the marks that there had been a sideward skid of the (Roberts) automobile.*

Q. (Mr. Beesley) All right. Now, I believe you indicated that there were marks on the highway running from the Roberts vehicle.

A. That's right.

Q. And all of these marks were on the east side of the highway?

A. That's right. This vehicle—from the marks I would be of the opinion that the vehicle—

MR. NEBEKER: I object, Your Honor, to any opinion given by the officer.

THE COURT: Yes.

MR. NEBEKER: I think he ought to confine himself to what he saw.

THE COURT: Just tell what you saw.

MR. BEESLEY: Certainly.

A. I saw the marks leading directly from the Roberts car back along the highway to the south for quite some distance, and they were quite wide apart, wider than would be made by the normal, oh, skidding of a car going down the highway straight, and then they ceased. All these marks were on the east side of the highway.

Q. And were these four tire marks, or were they just two?

A. Well, I think they were just two, say skidding and sluffing affair. (R 155, 156)

On recross examination Jackson was asked if it did appear from the tire marks that there had been a sideward skid of the automobile (Roberts truck).

Q. (Mr. Nebeker) Sheriff Jackson, did it appear from these tire marks that there had been a sideward skid of this automobile?

A. It was definitely sideward.

Q. And you have indicated on the board that those skid marks angle obliquely across the east half of the highway. Is that correct?

A. That's correct. (R 156)

It is obvious that Sheriff Jackson was going to volunteer his opinion that the Robert's truck skidded sidewards down the highway after the impact with the defendant's vehicle. Plaintiff's attempt to infer that the Sheriff was prevented from giving his "opinion" as to the point of impact is completely unfounded.

This court has previously recognized the importance of safeguarding the right of trial by jury. This court has stated that in order to give substance to that right, once the trial has been had and a verdict rendered, it should not be regarded lightly, nor overturned because of errors or irregularities unless they are of sufficient consequence to have affected the result. See *Hales v. Peterson*, 11 Utah 2d 411, 360 P. 2d 822 (1961); *Rivas v. Pacific Finance Co.*, — Utah 2d —, 397 P. 2d 990 (Utah 1964).

In weighing the testimony of patrolman Sherwood in the overall picture of this trial it is important to recognize that there was a conflict in the testimony as to the point of impact. Several witnesses testified to what they had observed at the scene of the accident. The jury had all this evidence before it.

In *Zelayeta v. Pacific Greyhound Lines Supra*, under very similar facts, the Court stated:

> "Apppellants argue the question of the admissibility of Edward's (police officer) opinion as if it were the most vital evidence in the case. They greatly overemphasize and exaggerate its importance. Edwards had testified, as did several other witnesses, as to what he observed at the scene of the

> accident. On direct examination he gave the reasons upon which his opinion was predicated. Eye witnesses testified as to the point of impact. Two other officers, at least equally competent, gave contrary opinions based upon the same facts. The jury had all this evidence before it. Under these circumstances, assuming that it was error to permit Edwards to give his opinion as to the point of impact, such error could not have been prejudicial. The transcript in this case covers some 1620 pages. A great deal of this record is devoted to the issue of where and how the collision occurred. The case was hotly contested and well tried on both sides. During such a trial it would be a rare occurrence indeed if some error in the admission or exclusion of evidence did not occur. * * * *After reading this record we are convinced that Edwards' testimony, whether rightfully or wrongfully admitted, played a very minor part in the ultimate determination of the case.* (Italics ours)

This court in *Hales v. Peterson Supra* recognized the necessity of viewing the overall picture of the trial to see if the parties have been afforded an opportunity to fully and fairly present their evidence and argument upon the issues. If the jury has made its determination the objective of the proceeding has been accomplished. The court said:

> "Anyone acquainted with the practical operation of a trial by jury and the human factors that must play a part therein is aware that it would be almost impossible to complete a trial of any length without some things occurring with which counsel, after the case is lost, can find fault and, in zeal for his cause, all quite in good faith, magnify into error

> which to him and the losing parties seems blameable for their failure to prevail. However, from the standpoint of administering evenhanded justice the court must dispassionately survey such claims against the overall picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceeding has been accomplished. And the judgment should not be disturbed unless it is shown that there is error which is substantial and prejudicial in the sense that it appears that there is a reasonable likelihood that the result would have been different in the absence of such error, which we have concluded does not exist here."

The court in its instruction No. 6 (R 48) advised the Jury:

> "* * * The testimony of each witness should be considered fairly and impartially and be given such weight and effect as you think it is entitled to, measured by reason and common sense and the standards given you in these instructions for determining the weight and credibility of witnesses generally."

In instruction No. 7 (R 49) the court gave the standard instruction relating to the weight and credibility of a witness.

> "In judging the weight and credibility of any witness, you should keep in mind the bias, if any is shown, of such witness; his interest, if any, in the result of the trial; and any probable motive or lack thereof to testify as he does. You may consider his

> appearance on the witness stand, the reasonableness or lack thereof of his statements, his apparent frankness and candor or the want of it, his opportunity to know, his ability to understand, his capacity to remember, together with all of the facts and circumstances which have a bearing on the accuracy of his statements. You should also consider any contradictory evidence and whether or not he contradicted himself, and from all the facts and circumstances given in evidence determine what weight and credibility you should give to the testimony of any witness."

These instructions properly advised the jury of their duty to weigh the credibility of the witnesses. It must be presumed that the jury followed the instructions and gave what weight they thought appropriate to the testimony of each witness.

Patrolman Sherwood's opinion was proper and did not constitute prejudicial error when viewed in the overall picture of this trial.

CONCLUSION

The admission or exclusion of evidence must of necessity be left to the sound discretion of the trial court. On cross examination the trial court permitted the patrolman to express his opinion as to the point of impact after the subject had been opened on direct. There was no abuse of discretion in admitting such testimony.

The plaintiff was afforded an opportunity to fully and fairly present her evidence and argument upon the

issues involved in this case. The jury, after extensive deliberation made its determination. Based on the jury's answers to the special verdict, the trial court entered judgment of no cause of action.

The judgment of the lower court should be affirmed.

Respectfully submitted

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